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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957.

No. 565

ELGIN, JOLIET AND EASTERN RAILWAY COMPANY,

Petitioner,

vs.

CLAIRON VERN GIBSON,

Respondent.

BRIEF FOR THE RESPONDENT IN OPPOSITION.

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THE GUNTHROP-WARREN PRINTING COMPANY, CHICAGO

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QUESTIONS PRESENTED.

Despite the manner in which the Petitioner attempts to present the question there was only one true question or issue submitted to the Court of Appeals, by the District Court's action in setting aside the jury verdict. That issue was, "Considering all the facts and circumstances in evidence together with inferences drawn in the light most favorable to Plaintiff, is there any evidence of negligence on the part of the Defendant, which if believed by the jury, would authorize the verdict versus the Defendant."

Under the circumstances of this Federal Employers' Liability Act case only one simple question is presented, and that is:

1. Whether the evidence is sufficient to support the jury verdict?

The Petitioner has injected a side issue. Although the Petitioner filed no motion for a new trial and filed no cross error when Respondent appealed, the Petitioner in the Court of Appeals for the first time attempted to characterize certain evidence as hearsay taking the position that it should not be considered. Petitioner is again making a play on words, but actually presents this question:

> 2. Whether Petitioner can first object to admitted evidence on appeal when it failed to object at the time of trial?

STATEMENT OF THE CASE.

The Respondent charged many different acts of negligence in his complaint. (R. 6.) Evidence regarding any one act which, in whole or in part, contributed to Respondent's injury was sufficient to sustain the verdict. Respondent will briefly summarize the evidence, due to fact that Defendant ignored most of it.

The Respondent herein, and George Marjanian worked in interstate commerce as timekeepers for the Elgin, Joliet & Eastern Railway Company. They worked in the yard in what was referred to as Building No. 100 or Shanty No. 100. (R. 64, 65.) The interior of the building had a bare wooden floor. (R. 20.) About the exterior were cinders. (R. 47.) Respondent worked at one of four desks, around which, from time to time, applicants for employment and employees came on business. (R. 19.) These men brought in dirt, cinders, pebbles and grease making the floor dirty and slippery. (R. 21.)

At one time there had been a door mat and foot scraper at the entrance or on the step. The foot scraper broke off and was never replaced. There was no door mat at the entrance. Respondent had requested his boss that a foot scraper or door mat be furnished. This request was turned down. (R. 24, 77, R. 236 Int. 53, 54.) Due to the

numbers of men tramping in during the day, the floor was dirty every night." (R. 46.)

On the night of December 12, 1951, both timekeepers worked overtime getting out the payroll. (R. 83.) George Marjanian asked the Respondent to put an adding machine under the desk to avoid its being damaged by the truck drivers in the morning. (R. 26, 27.) Respondent had done this on previous occasions. (R. 47.) Respondent in putting the adding machine under the desk, slipped on some pebbles, cinders or grease, lost his balance and struck his head on the edge of the desk. Marjanian, hearing a loud noise, turned and saw the Respondent holding his head in his hands. The Respondent told his fellow employee he had slipped on some cinders or some pebbles and struck his head on the desk. Respondent admitted in his deposition that he must have slipped on some grime or grease on the floor. (R. 27, 152.)

The Respondent's wife, Lois Gibson, said Respondent came home with a dazed look. His clothes were very dirty. His trousers around the cuffs and leg seemed to have grease or something at *least* foreign to what his clothes normally were. Respondent said he had bumped his head. Mrs. Gibson said the dirt was a greasy substance down the front of his leg, probably the left. The dirty spot was just below the knee. She stated it looked like a streak of grease. She had him change his clothes and put them in the wash. (R. 223, 224, 229, 230.)

As a result of the blow Respondent commenced having symptoms. Ultimately the diagnosis of chronic subdurol hydroma associated with cerebral atrophy was made. (R. 105, 196.)

Defendant's witness, Mr. Cogswell, a claim agent, admitted he took two sets of pictures of the interior of the shanty. The second set was taken on April 23, 1953, which

were introduced. The first set taken earlier, at an undeterminable date, were not introduced nor produced, although neither the witness nor the Defendant's attorney knew what happened to this first set of pictures. The witness admitted the pictures which were not produced, showed something on the floor in the front part of the picture to the side of the desk, but that the second set which were introduced, did not show these marks. (R. 255, 256.)

A Mr. Brasel, an Assistant Vice-President of the Defendant Company, admitted he suggested to Plaintiff that he place his claims in the hands of an attorney. (R. 270, 271.) Other than the claim agent and the Assistant Vice-President, Defendant failed to bring in any witnesses.

The Petitioner now says that the District Judge and the Court of Appeals considered only two items of evidence as relied upon to sustain the verdict. (A. 5.) Respondent disagrees. It is apparent that the majority of the Court of Appeals summarized the evidence (A. 1, A. 2, A. 3) and then referred to evidence of Marjanian and the Plaintiff as to Plaintiff's slipping. The majority also referred to what Mrs. Gibson said. The majority point out that Marjanian's testimony, even if hearsay, when not objected to, was sufficient to establish a fact in controversy.

Although the trial court admitted, "While the evidence, as showed by this testimony, is that the floor of Building No. 100 was dirty on the evening in question and that frequently there were quantities of cinders, pebbles, grease and tar on the floor" (R. 298), nevertheless, Judge Schnackenberg, in his disserting opinion claimed, as of course, did the Defendant in the Court of Appeals that there is no such evidence in the record that on the evening in question the floor was dirty. (A. 9.)

Respondent quotes from the record:

Testimony of George Marjanian at R. 21:

"Q. Can you tell us what the condition of this floor would be after say eight hours of work?

A. It would be dirty, naturally.

Q. Tell us what kind of dirt you have seen in that building after eight hours?

A. Cinders, dirt, could be sand, or anything like that, could be grease, could be pebbles, could be anything."

(R. 24, 25):

"Q. Can you tell us what sort of dirt was on the floor on that evening of December 12th or 13th?

A. Well, it was dirty, but I couldn't say exactly what was in there; it was slippery; dirt; it could be a little bit of cinders in there, I couldn't tell you exactly.

Mr. Hackbert: I move to strike out what 'could' be.

The Witness: Well, it was very dirty, let me put it that way.

The Court: What could be, of course, that will go out. The best you remember as to what was that on that occasion on the floor.

The Witness: There was a little cinders on the floor."

(R. 27):

"Q. Can you tell us whether anything happened that was unusual at that time?

A. * * * I came back in, and he started to tell me that he slipped under his desk and hit his head under his desk; he told me he slipped on some cinders or pebbles; I couldn't tell you exactly what he said at that time."

Cross-examination of George Marjanian (R. 46):

"Q. Now you spoke of the condition of the floor being dirty *that night*. There wasn't anything about the condition of the floor being dirty that night that

was any different than would normally be found at the end of eight hours of work in that building, was there?

A. Yes, sir.

Q. What was there different?

A. After eight hours of work, the men tramped in there, signed their sheets, and went home, that place got dirty.

* * * * *

Q. That was the number that came in every night to sign out in that building?

A. That's right. *Every night that floor was dirty.*"

Testimony of Plaintiff, Clairon Vern Gibson (R. 76):

"Q. Now, Mr. Gibson, when the section gangs or the men, different men, came into shanty 100, would they drag in anything at any time?

A. Well, yes, because they cut across tracks which are full of cinders and grease and what not that are on the tracks. There's oil men and grease men, sweepers, assigned by the foreman to do different duties in Kirk Yard, and especially on the switch points, to keep them moving easily."

(R. 77):

"Q. What different particles came into the shanty that were dragged in this way?

A. Well, whatever could be carried on the pants' cuffs of the legs from unloading cinder cars or aggregate cars, or off of their boots.

Q. Let me ask you directly, were any cinders, pebbles, grease, tar, things of that sort, ever brought in?

A. Oh yes, yes; the shack was very dirty, because every time Tom Bagoff swept it off—he was the janitor—every time he swept it out, there was thick piles of dirt he had to take up off the floor."

By Justin Waitkus referring to Respondent's Exhibit No. 4 (R. 89):

"Q. Mr. Gibson, in this picture is there any change, as far as the floor is concerned, between what it shows

in the picture now and what it was on the night of December 12, 1951?

A. The night I worked overtime the floor was much dirtier than that."

(R. 118):

"Q. Let me ask you whether you ever used the broom?

A. Yes, I have, because when I went to back my chair to get out, to get my legs out from underneath the desk, I couldn't back it up because the rollers would be clogged, stopped from rolling by debris on the floor."

Cross-Examination by Mr. Hackbert (R. 152):

"Q. Do you know what it slipped on?"

You answered, "I couldn't tell you; I don't remember; I don't remember what it slipped on, other than just grime on the floor or maybe grease."

Mrs. Gibson's testimony at R. 229:

"Q. And there wasn't anything unusual about that circumstance that night that he came home looking a little bit dazed?

A. His clothes were in much worse condition than normal.

Q. What, if anything, did you observe about the location of any dirt on his clothes?

A. The only thing that I could say that I observed was the fact that there was this streak of grease on his clothes, or whatever that was."

REASONS FOR REFUSING THE WRIT.

1. The decision of the Court of Appeals does not conflict with any decisions of that Court or this Court.

2. The decision below is consistent with time-honored principles.

3. Review is not required or justified because judgment below turned on a question of fact.

ARGUMENT.

Under the Federal Employers' Liability Act a carrier is liable for an injury resulting *in whole or in part from negligence of the carrier by reason of any defect or insufficiency due to its negligence in its appliances, works, or other equipment.* (Our emphasis.)

It is quite evident that the judgment below turned on a question of fact. The obvious fact question was whether employer negligence played any part, *even the slightest*, in producing the employee's injury. The majority of the Court of Appeals summarized 523 pages of testimony (A. 1, A. 2, A. 3) which showed that the Petitioner failed to furnish the employee with a reasonably safe place in which to work. There was a *defect and insufficiency* in that the employer failed to furnish a door mat or foot scraper before the door. Furthermore, when the evidence shows that there had been such items furnished at one time, it is apparent the railroad carrier thought it a necessity. Then, when the foot scraper broke off it was never replaced, although Respondent requested his boss for such items but was turned down. Under the statute this was a defect or insufficiency in the equipment, appliances and works.

Due to lack of said door mat or foot scraper the interior of Shanty or Building No. 100 became dirty with pebbles, cinders and grease, which in turn caused Respondent to slip and sustain the injury in question.

These, briefly, were some of the facts which were considered by the jury and the Court of Appeals. Our statement of facts is not limited to only two items of evidence which Petitioner would have this Court believe was all that was considered. Petitioner ignores all the evidence hereto-

fore admitted in evidence and now attempts to limit the entire verdict upon only two items of evidence, namely, (1) To the unobjected to evidence of George Marjanian and (2) To one statement of the Respondent. Petitioner is attempting to characterize all the evidence of Respondent as being speculative. The Petitioner fails to view the evidence in the light most favorable to the prevailing party. *Sivert* v. *Penn. R. Co.*, 197 R 2d 371-375 (7th Cir.).

As the majority stated (A. 5):

> "It is no answer to say that the jury's verdict involved speculation and conjecture. Whenever facts are in dispute or the evidence is such that fair-minded men may draw different inferences, a measure of specalation and conjecture is required on the part of those whose duty it is to settle the dispute by choosing what seems to them to be the most reasonable inference."

Lavender, Administrator, v. *Kurn, et al.*, 327 U. S. 645, 653, cited with approval in *Webb* v. *Illinois Central R. Co.*, 325 U. S. 512, 515 (Footnote).

Petitioner cites several cases and says that "the essential requirement is that mere speculation be not allowed to duty for probative facts." Its case of *Moore* v. *C. & O. R. Co.*, 340 U. S. 573 which came up from the Fourth Circuit, definitely showed there was no evidence of any probative facts. The evidence showed the brakeman fell off a footboard of a tender. After he fell off, the engine was stopped. The engineer was the only eye witness who testified to the fact. The Court said at page 576:

> "True, it is the jury's function to credit or discredit all or part of the testimony. But disbelief of the engineer's testimony would not supply a want of proof."

Obviously the case is not in point and is not in conflict with the decisions of this Court or of any decision of the Courts of Appeal referred to by Petitioner.

Petitioner also cites *Galloway* v. *U. S.*, 319 U. S. 372 as being in conflict. Respondent disagrees. The *Galloway* case went up from the Ninth Circuit. In that case Plaintiff had burden of showing continuing and total and permanent disability for nearly twenty years. This the Plaintiff failed to show. This too was a case where there was no evidence. Obviously this case is not in conflict with the decisions of this Court, the Courts of Appeal, or the decision of the majority in this case.

Petitioner also cites *Tennant* v. *Peoria & P. U. Ry. Co.*, 321 U. S. 29 at 32 (7th Cir.). Presumably, Petitioner quoted from the *Tennant* case (Pet. 10), but Petitioner failed to complete the quote. The quote is as follows:

> "The essential requirement is that mere speculation be not allowed to do duty for probative facts, *after making due allowance for all reasonably possible inferences favoring the party whose case is attacked.*" (Our emphasis.)

In the *Tennant* case the Court held that there was evidence for the jury and that courts were not free to reweigh the evidence and set aside the jury verdict merely because the jury could have drawn different conclusions or because judges feel that other results are more reasonable.

We submit this case is not in conflict with decisions of this Court or the Court of Appeals. *Beattie* v. *E. J. E.* (7th Cir.), 217 F. 2d 863, *Schulz* v. *Penn. R. Co.*, 350 U. S. 523, *Rogers* v. *Mo. Pac. R. Co.*, 352 U. S. 500, *Webb* v. *Ill. Cent. R. Co.*, 352 U. S. 512, *Arnold* v. *Panhandle* v. *Santa Fe R. R.*, 77 S. Ct. 840 (1957), *Ringheiser* v. *C. & O. Ry.*, 77 S. Ct. 1093 (1957).

Respondent submits that the record is replete with evidence of negligence which in whole or in part produced the injury of employee.

Petitioner also relies on *Stephens* v. *Sears Roebuck & Co.*,

(C. A. 7), 212 F. 2d 260. This case does not apply because there was no evidence of any unsafe condition. The plaintiff had concluded there was wax on the floor because it appeared slick. The plaintiff's counsel admitted that wax on the floor was not negligence *per se*. The proof was that the defendant never waxes the washroom floors. Obviously, the plaintiff produced no evidence. Incidentally, this case did not arise under the Federal Employer's Liability Act.

Petitioner also cites *Reuter* v. *Eastern Air Lines*, (C. A. 5), 226 F. 2d 443. This case is similar to *Stephens* v. *Sears Roebuck & Co.*, 212 F. 2d 260, in this that neither case is in point because there was no evidence of any negligence presented. In this case the plaintiff was starting down the steps of the plane when her heel grabbed and she pitched forward. Later she inspected a similar plane and concluded that her heel caught on a metal strip. The evidence showed there was no loose strips on any of the planes. This is another case of no evidence.

Petitioner cites case of *Sickles* v. *Graybar Electric Co.*, 219 F. (2) 847. Case is also one of not having any evidence of any kind as to how a certain scaffold had been moved or by whom. These were not Federal Employers' Liability Act cases. It is clear that none of the cases cited by Petitioner are in conflict with and decisions of this Court or the Court of Appeals.

It is also apparent that the dicta quoted in case of *Cons. Ed. Co.* v. *Labor Board*, 305 U. S. 197 and followed on *U. S.* v. *Krumsick*, (C. A. 1) 11 F. 2d 74 was not in point because there was no evidence of any kind that deceased ever applied for or was granted insurance. There was no evidence. Neither of these cases are in conflict with any decisions of this Court or the Court of Appeals.

The decision in the Court of Appeals is consistent with

time-honored principles. Since 1939 The Federal Employers' Liability Act 45 U. S. C. A., Sec. 51 *et seq.* uses the words "in whole or in part" as the test for causation in these interstate railroad employee injury cases. It is a new standard, not previously known to the law. It's clear purpose was to relax and indeed remove the stringent and restrictive tests and obstacles in cause and effect theretofore judicially created and imposed through the years in Anglo-Saxon tort litigation. "Foreseeability", "direct", "immediate", were all adjectival pitfalls to the maimed and crippled as well as to the tragic widows and orphans of accidental victims. We must assume Congress was aware of all these and purposefully sought to avoid and overcome all of them.

It is established law everywhere that one may prove a case by circumstantial evidence as well as by direct proof. In every jurisdiction even in the criminal law, a man may forfeit his very life by reason of circumstantial proof. It is universally accepted, that one may draw legitimate inferences from facts proven, and predicate a cause of action on such proof. In Federal Employers' Liability Act cases, it is the right of the jury to base a recovery on inferences which spell out negligence even though there be other evidence in the case which equally well spells no negligence. *Lavender* v. *Kurn, supra.* There is no need that the facts support only and exclusively the conclusion of negligence or causation. That thinking may be part of the legal philosophy of local tort law, but under this federal statute a federal right has been granted and federal law is supreme in this field.

The whole theory of the Federal Employers' Liability Act and the philosophy in the light of which it must be interpreted can best be found in the language of Justice Douglas in *Bailey* v. *Vermont Central R. R. Co.*, 319 U. S. 350 at 354. These principles have been followed since the

1939 Amendment to the Federal Employers' Liability Act. The decision of the majority below is consistent with the opinion of this Court and other Courts. There have been many previous decisions which have already determined the same issue being raised by Petitioner.

Review by the Supreme Court is not required or justified because the judgment below turned on questions of fact.

Petitioner also poses a "loaded" question regarding what it presumed to be hearsay evidence. The majority disposes of the question, in the Court of Appeals, and cites decisions of this Court (A. 4) to the effect that "Hearsay evidence admitted without objection may be regarded as sufficient to establish a fact in controversy." Petitioner never objected to what he first designated to be "hearsay evidence" for the first time in the Court of Appeals, nor did he file any cross-error.

Petitioner wishes to rely on Judge Schnackenberg's dissent when he claims that ten or eleven lines of probative evidence given by the co-worker, Marjanian, was "eviscerated" because of an afterthought or expression, such as, "I couldn't tell you exactly what he said at that time." This is an often used expression which people use in everyday affairs. The bench and bar are chronic users of the term when referring to a decision as having been in favor of "so and so" or "such and such a finding was made" and ending up with the expression "I can't tell you exactly what the court said". Obviously, this expression regarding exactitude wouldn't deprive any previous statement of vitality or truthfulness. Needless to say, neither opposing counsel or myself could, under oath, repeat exactly what we said or what the respective members of the court said to us just a short time ago.

The jury saw the witness on the stand, heard the evidence, took into account the inflection of certain words, the

stress and weight given to certain phrases, whether witness smiled or laughed when answering, whether he deliberated or paused, whether the witness went through any motions or gestures, whether he appeared honest and candid in trying to get the facts before the jury. None of these things appear in the cold transcript of a record.

At this time we have no way of knowing what interpretation or inference the jury drew from Marjanian's afterthought. Perhaps the witness didn't want to tell exactly the strong language or epithets used when the plaintiff slipped and hit his head. Perhaps he referred to sentence structure or sequence of words. At this late date defendant cannot attempt to take advantage of a cold statement in a transcript and twist it around to serve its purpose. To permit defendant to do this would have the effect of "eviscerating" valuable evidence and allow the defendant to weigh the evidence in a light most favorable to itself.

CONCLUSION.

The decision below was clearly correct. We respectfully submit that the petition for certiorari should be denied.

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Attorney for Respondent.